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Max Nelson
Vice President, Public Policy and Strategic Business Planning
OFS
July 28, 2004



Re: Ex Parte Presentation in CC Docket No. 01-338
Review of the Section 251 Unbundling Obligations of
Incumbent Local Exchange Carriers

July 28, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 01-338
Review of the Section 251 Unbundling Obligations of
Incumbent Local Exchange Carriers

Dear Ms. Dortch:

This is to inform you that today, July 28, 2004, I, Max Nelson, Vice President of Public Policy and Strategic Business Planning for OFS met with Commissioner Kathleen Abernathy and her Senior Legal Advisor, Matthew Brill, to discuss how a few specific clarifications in the FTTP regulatory and legal regime of the TRO would be necessary to truly reduce the uncertainty in investment decision-making leading to an end to the Telecommunications Depression and Universal Broadband Deployment.

In accordance with Commission rules, I am filing copies of our presentation and request that it be included in the record of the proceeding identified above.

Respectfully submitted,

A handwritten signature in black ink that reads 'Max Nelson'. The signature is written in a cursive, flowing style.

Max Nelson

Attachment – OFS Presentation

Max Nelson

Vice President, Public Policy

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Leading Optical Innovations

**Leadership Actions to Improve Investment Certainty That
Are Still Required to End the Telecommunications
Depression and Spur Universal Broadband**

The Triennial Review Order and FTTP Regulatory Regime:

So Close. So Close, and Yet... So Far.



The FCC Has Made Tremendous Progress With Tremendous Effort For Which the Industry Is Grateful



- 1. The FCC TRO Has Created a New Access Network Regulatory Framework that Makes Future Network Investment *Possible* (though not necessarily probable) That Could End the Telecom Depression and Lead to Universal Broadband**
- 2. The Cable Modem and TRO Rulings Have Created a Deregulatory Context for Broadband and New Technologies Under Which “New Wires” Are Regulated Under “New Rules”**

However...

- **While the TRO Provides A Regulatory Framework (The “Skeleton”) to Make Broadband Investment Possible, the FCC Has Yet to Provide A Sufficient Legal Structure (The “Muscles”) to Provide Enough Certainty Through Which Bottom-Up Business Case Decision-Making Can Make Such Investments Probable – A few Muscle Groups Are Missing, so the Skeleton Can Only Move Forward a Few Initial Steps Until The Holes Are Filled**
 - **Network Investment Decisions Are Made On a Region-by-Region Basis Depending on Factors Such as Neighborhood Demographics, Geography, Construction, etc...**
 - **There Are Several Cases In Which the TRO Regulatory Structure Does Not Clarify the Legal Status of FTTP Deployments and Associated Services.**

Just a Few More Miles to Go Before We Sleep...

- **There Are a Few Specific Key Legal Points That Without Clarification Will Significantly Retard the Investment Incentive of the TRO, As the Legal Uncertainty They Cause Make Some Business Planning Impossible -- Construction Machinery Gives Way to Legal Machinery**
 - **The Definition of “Premises” in FTTP**
 - Include of MTU/MDU
 - Definition of “Mass Market”
 - Include FTTC/FTTN (Deregulate All New Broadband Investment)
 - **The Primacy of the TRO Regulatory Regime in FTTP Access Networks -- “New Wires, New Rules” to Stimulate Investment**
 - TRO Provides UNE Freedom Under Section 251, But Did Not Address Section 271. Thus, Carriers Who Deploy “New Wires” In Many States Could (Would) Be Burdened By “Old (UNE) Rules”
 - TRO Failure to Define FTTP Broadband Services as a Title I “Information Service” Leaves FTTP Services Open to Title II Common Carriage Regulations.

The Industry Recovery Still Needs Some Prompt (Clarifying) FCC Action... SOS!

- **Clarify Definitions (MTU, Mass Market, FTTC/N)**
- **Declare the Primacy of the TRO for New Access Networks**
 - **Waive (at least in the interim) Title II Common Carrier Obligations for FTTP Broadband Services**
 - **Forbear from applying Section 271 UNE's to FTTP Broadband Networks That Are No Longer Subject to Section 251 Obligations**
- **Since the Telecom Act of '96, Metro and Access Network Outside Plant Upgrade Investments by Both ILECs and Competitors Have Been Virtually Frozen. A TRO Made Effective by Clarification and Regulatory Primacy Would Remove the Uncertainty in Their Investment and Lead Directly to Telecom Recovery and Universal Broadband**

You've Done So Much, But the Significant Lack of Legal Clarity Creates Tremendous Business Uncertainty Leading to Dramatic Underinvestment